(4)

No. 87-900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

REICHHOLD CHEMICALS, INC.,
Petitioner,

v.

GERARD A. CASSINO and SALLY CASSINO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	3
SUMMARY OF REASONS FOR GRANTING THE WRIT	4
REASONS FOR GRANTING THE WRIT	6
REVIEW BY THIS COURT IS NECESSARY BECAUSE THE NINTH CIRCUIT'S DECISION CONTRAVENES THE POLICY OF ENCOURAGING SETTLEMENT OF CLAIMS, CONFLICTS DIRECTLY WITH AN APPLICABLE DECISION OF THIS COURT AND WILL HAVE A CHILLING EFFECT ON BONA FIDE SEVERANCE PAY PROGRAMS	6
I. THE NINTH CIRCUIT'S RULING ALLOWING THE ADMISSION OF AN UNSIGNED SETTLEMENT AGREEMENT TO PROVE LIABILITY CONFLICTS WITH THE SOUND PUBLIC POLICY ENCOURAGING SETTLEMENT OF CLAIMS REFLECTED IN EVIDENCE RULE 408	6
A. Public Policy Supports Compromise of Claims	6
B. Evidence Rule 408, Which Precludes the Use of Settlement Offers to Prove Liability, Protects Attempts to Resolve Disputes Amicably	9
II. THE NINTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S HOLDING IN *TRANS WORLD AIRLINES V. THURSTON* THAT A "WILLFUL" VIOLATION REQUIRES KNOWLEDGE OR RECKLESS DISREGARD OF THE ADEA	13

TABLE OF CONTENTS—Continued

Page

III. THE NINTH CIRCUIT'S DECISION COULD JEOPARDIZE BONA FIDE SEVERANCE PROGRAMS, TO THE DETRIMENT OF EMPLOYEES, EMPLOYERS, AND THE GENERAL PUBLIC POLICY FAVORING SETTLEMENTS ---------- 16

CONCLUSION ---------- 19

TABLE OF AUTHORITIES

Cases: Page

Adcock v. Firestone Tire and Rubber Company, 822 F.2d 623 (6th Cir. 1987) ---- 16

Air Line Pilots Association, International v. Trans World Airlines, Inc., 713 F.2d 940 (2d Cir. 1983) ---- 5, 14

Alexander v. Gardner-Denver Company, 415 U.S. 36 (1974) ---- 7

Branch v. Fidelity & Casualty Co. of New York, 783 F.2d 1289 (5th Cir. 1986) ---- 10

Brock v. Richland Shoe Company, 799 F.2d 80 (3rd Cir. 1986) (*cert. granted*, No. 86-1520, October 5, 1987) ---- 14

Burns v. City of Des Peres, 534 F.2d 103 (8th Cir. 1976) ---- 10

Burns v. Equitable Life Assurance Society of the United States, 696 F.2d 21 (2d Cir. 1982), *cert. denied*, 464 U.S. 933 (1983) ---- 3

Cassino v. Reichhold Chemicals, Inc., 817 F.2d 1338 (9th Cir. 1987) (*petition for cert. filed*) ---- 4, 8, 10, 11, 14

Florida Trailer and Equipment Co. v. Deal, 284 F.2d 567 (5th Cir. 1960) ---- 17

Henn v. National Geographic Society, 819 F.2d 824 (7th Cir. 1987), *cert. denied*, November 30, 1987, No. 87-558 ---- 8

Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539 (8th Cir. 1987), *cert. denied*, 107 S.Ct. 3212 (1987) ---- 3, 12

Lorillard v. Pons, 434 U.S. 575 (1978) ---- 3

Moore v. McGraw Edison Company, 804 F.2d 1026 (8th Cir. 1986) ---- 12

Pilon v. University of Minnesota, 710 F.2d 466 (8th Cir. 1983) ---- 7

Pruet Production Co. v. Ayles, 784 F.2d 1275 (5th Cir. 1986) ---- 12

Ramada Development Company v. Rauch, 644 F.2d 1097 (5th Cir. 1981) ---- 10

Runyan v. National Cash Register Corp., 787 F.2d 1039 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 178 (1986) ---- 3, 7

TABLE OF AUTHORITIES—Continued

Page

Sherrod v. Sears, Roebuck & Co., 785 F.2d 1312 (5th Cir. 1986) 12
Sullivan v. Boron Oil Company, —— F.2d ——, No. 202 Daily Labor Report (BNA), October 21, 1987 at D-1 (3rd Cir. September 30, 1987) 7, 8
Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) 2, 3, 5, 13, 14
United States v. Armour & Co., 402 U.S. 673 (1971) 17
United States v. Contra Costa County Water District, 678 F.2d 90 (9th Cir. 1982) 4, 9, 10

Statutes:

Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* 2, 4
Section 7(b), 29 U.S.C. § 626(b) 13
Section 7(d), 29 U.S.C. § 626(d) 6
Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* 13
Section 16(b), 29 U.S.C. § 216(b) 13
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* 2
Section 706(b), 42 U.S.C. § 2000e-5(b) 6

Regulations:

Administrative Exemptions
29 C.F.R. § 1627.16 7
29 C.F.R. § 1627.16(c)(1) 15
52 Fed. Reg. 32,293 (1987) (to be codified at 29 C.F.R. § 1627.16) 8

Federal Rules of Evidence:

Compromise and Offers to Compromise, Fed. R. Evid. 408 ..... 4, 9

TABLE OF AUTHORITIES—Continued

Miscellaneous: Page

H.R. 2763, 100th Cong., 1st Sess., 133 Cong. Rec. S14,383 (October 15, 1987) ---------- 8

10 J. Moore and H. Bendix, Moore's Federal Practice, § 408.01 (2nd ed. 1987) ---------- 10

R. Silberman and C. Bolick, *The EEOC's Proposed Rule on Releases of Claims under the ADEA*, 37 Lab. L.J. 195 (1986) ----------7, 8, 12, 14, 16

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief as amicus curiae in support of the petition for a writ of certiorari in this case filed by Reichhold Chemicals, Inc. ~~Statements of consent have been submitted to the Clerk of the Court.~~

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote sound approaches to the elimination of discriminatory employment practices. Its membership consists of a broad segment of the employer community in the United States, including individual employers as well as several trade associations which themselves have hundreds of corporate members. The members of EEAC are firmly committed to the principles of nondiscrimination and equal opportunity in employment.

Substantially all of the Council's members, and the constituents of its trade association members, are employers subject to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, as well as other equal employment statutes and regulations. As employers, many of EEAC's members maintain severance pay programs providing funds to terminated employees. Also, as potential respondents to civil rights charges and other employment-related claims, they are interested in encouraging the voluntary resolution of such claims.

The issues presented in the petition for certiorari are extremely important to the nationwide constituency which EEAC represents. The Ninth Circuit held that an unexecuted release of claims requested in exchange for severance pay is admissible to prove liability and to prove a willful violation of the ADEA. The lower court's holding frustrates the policy of encouraging settlements without litigation and undercuts the voluntary resolution of charges under the ADEA and other civil rights statutes, such as Title VII, Equal Pay Act, or wrongful discharge claims. Moreover, the holding conflicts with this Court's decision in *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985), that a "willful" violation of the ADEA can be proven only by showing knowledge or reckless disregard of the ADEA, and adopts a minimal standard previously rejected by this court.

The lower court's decision could also have a chilling effect on bona fide severance pay programs designed to provide employees with increased economic security during the often difficult transition to new employment.

Because of its interest in the application of the nation's civil rights laws, EEAC has filed over 220 briefs as amicus curiae in cases before the United States Supreme Court, the United States Circuit Courts of Appeals and various state supreme courts. A number of the cases in

which EEAC has participated have involved the proper interpretation of the ADEA. *See, e.g., Trans World Airlines, supra; Lorillard v. Pons*, 434 U.S. 575 (1978); *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977); *Burns v. Equitable Life Assurance Society of the United States*, 696 F.2d 21 (2d Cir. 1982), *cert. denied*, 464 U.S. 933 (1983). EEAC also has participated in several cases involving the validity of releases of ADEA claims. *See, e.g., Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539 (8th Cir. 1987), *cert. denied*, 107 S. Ct. 3212 (1987); *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 178 (1986).[1]

STATEMENT OF THE CASE

In mid-1982, Reichhold Chemicals, Inc. ("Reichhold") began a corporate reorganization which resulted in the sale or closure of several Reichhold facilities and a substantial reduction in force. Prior to the reorganization, Gerard Cassino was responsible for assisting in the negotiation and administration of collective bargaining agreements at several Reichhold facilities in the western United States. Most of these facilities were closed, sold or transferred as part of the reorganization, virtually eliminating Cassino's duties.

Cassino was advised in December 1982 to begin looking for another job. His position was terminated in June 1983. Cassino received formal notice of his termination at a meeting with Reichhold officials. At this meeting, Cassino was offered a separation payment of $18,000 cal-

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[1] EEAC has sought and received permission from this Court to file briefs in other cases concerning non-discrimination in employment. *See, e.g., State of Florida v. Long*, No. 86-1685, *cert. granted*, 56 U.S.L.W. 3206 (1987); *Marino v. Ortiz*, No. 86-1415 (*decision pending*); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978); and *Shell Oil Co., supra.*

culated according to his age, salary and length of service. In return, Reichhold asked Cassino to sign a "Settlement Agreement and General Release" waiving claims arising out of his employment. Cassino refused.

Cassino, who was then 52 years old, sued Reichhold under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* Over Reichhold's objection, the trial court admitted the unsigned "Settlement Agreement and General Release" into the record as evidence relevant to the substance of the underlying claim of age discrimination. The jury awarded Cassino $81,000 in back pay, $150,000 in front pay, $246,000 in liquidated damages, and $15,000 on state law claims.

The Ninth Circuit found no abuse of discretion in the admission of the unsigned agreement into evidence, rejecting Reichhold's argument that the release was an inadmissible offer of compromise under Fed. R. Evid. 408. The court concluded that while offers of settlement made after termination are inadmissible to prove liability, offers made contemporaneously are "probative on the issue of discrimination." *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1342 (9th Cir. 1987) (*petition for cert. filed*, No. 87-900).

The court then affirmed the jury's award of liquidated damages, citing to the unsigned release as part of the "substantial evidence" supporting the jury's finding of a "willful" violation of the ADEA. 817 F.2d at 1348.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Review by this Court is necessary because the opinion below conflicts directly with well-established policy encouraging the settlement of claims without litigation. *See, e.g. United States v. Contra Costa County Water District*, 678 F.2d 90 (9th Cir. 1982). Instead of excluding the proposed "Release and Settlement Agreement" from evidence, as required by Fed. R. Evid. 408, the Ninth Cir-

cuit admitted it as evidence of liability and of a willful violation of the ADEA. The lower court's position is likewise contrary to the position taken by the Equal Employment Opportunity Commission, which has endorsed the use of releases of ADEA claims.

Review by this Court also is necessary because the Ninth Circuit has sanctioned an abrupt departure from the usual course of judicial proceedings. By accepting the unsigned release as evidence of a willful ADEA violation, the lower court in essence has revived the minimal "in the picture" standard expressly rejected by this Court in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). The Ninth Circuit's decision thus conflicts directly with this Court's holding in *Trans World Airlines* that proof of a "willful" ADEA violation requires a showing that "'. . . the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" 469 U.S. 111, 128 (1985) (quoting *Air Line Pilots Association, International v. Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2d Cir. 1983)). A request for a release is not an admission of liability; it merely shows that the employer was protecting itself from a suit on those grounds. Accordingly, the court below has significantly lowered this Court's standard of proof necessary to show a willful violation of the ADEA.

Further, the Ninth Circuit's decision is likely to have a chilling effect on employer severance pay programs, particularly those arising from reductions in force. The lower court's holding can be applied not only to ADEA claims, but also to Title VII, wrongful discharge, and other causes of action arising out of employment relationships. If an unsigned release is admissible to prove liability, then employers will have to consider not asking employees to release potential claims. As a result, however, employers will be much less willing to offer gratuitous severance payments without any security against suits by former employees who have received the benefit

without having incurred any countervailing obligation. Thus, employees who have no dispute with the employer and who would be more than willing to execute releases will nevertheless be denied the opportunity to receive severance payments to ease the transition to new employment.

REASONS FOR GRANTING THE WRIT

REVIEW BY THIS COURT IS NECESSARY BECAUSE THE NINTH CIRCUIT'S DECISION CONTRAVENES THE POLICY OF ENCOURAGING SETTLEMENT OF CLAIMS, CONFLICTS DIRECTLY WITH AN APPLICABLE DECISION OF THIS COURT AND WILL HAVE A CHILLING EFFECT ON BONA FIDE SEVERANCE PAY PROGRAMS.

I. THE NINTH CIRCUIT'S RULING ALLOWING THE ADMISSION OF AN UNSIGNED SETTLEMENT AGREEMENT TO PROVE LIABILITY CONFLICTS WITH THE SOUND PUBLIC POLICY ENCOURAGING SETTLEMENT OF CLAIMS REFLECTED IN EVIDENCE RULE 408.

A. Public Policy Supports Compromise of Claims.

The decision below disregards sound public policy encouraging the compromise of claims without litigation. Amicable settlements reduce unnecessary costs for all parties and avoid overcrowding of judicial calendars and delays in disposition of cases. In furtherance of this policy, a number of procedures and safeguards have been created to encourage and facilitate the settlement of claims. For example, both Title VII of the Civil Rights Act of 1964 and the ADEA provide for informal resolution through conciliation, conference and persuasion. 42 U.S.C. § 2000e-5(b); 29 U.S.C. § 626(d).

Many employers, when implementing reductions in force, offer terminated employees "severance pay" to ease the transition to new employment. In exchange, employers often ask for written waivers of all potential legal claims against them. Such a waiver usually includes a

release of claims of discriminatory conduct during the employment relationship. *See generally* R. Silberman and C. Bolick, *The EEOC's Proposed Rule on Releases of Claims under the ADEA*, 37 Lab.L.J. 195, 195-6 (1986) (discussion of releases in the context of employment discrimination). Releases of this type have been enforced repeatedly as consistent with public policy and the purposes of both Title VII and the ADEA. *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 52 (1974) (authorizing voluntary waiver of Title VII claims); *Pilon v. University of Minnesota*, 710 F.2d 466 (8th Cir. 1983) (Title VII age and sex discrimination claims waived by general release); *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir.), *cert. denied*, 107 S. Ct. 178 (1986) (unsupervised release of ADEA claim valid); *Sullivan v. Boron Oil Company*, —— F.2d ——, No. 202 Daily Labor Report (BNA), October 21, 1987 at D-1 (3rd Cir. September 30, 1987) (general release barred ADEA claims).

Further, the EEOC endorses knowing and voluntary releases of ADEA claims made in exchange for valuable consideration. Agency regulations at 29 C.F.R. § 1627.16 list three safeguards it considers to be indicia of a knowing and voluntary waiver:

> (1) The agreement was in writing, in understandable language, and clearly waived the employee's rights under the ADEA;
>
> (2) A reasonable period of time was provided for employee deliberation;
>
> (3) The employee was encouraged to consult with an attorney.

Id.[2] These concepts were recapitulated by the Third Circuit in *Sullivan v. Boron Oil Company*, *supra*, holding

[2] The EEOC's list of circumstances indicating a knowing and voluntary waiver are part of the final rule published August 27, 1987 adopting an administrative exemption allowing for the en-

that a general release "from all claims of employment discrimination" barred ADEA claims. *Sullivan, supra,* at D-2. One reason for asking for a release, of course, is to avoid the very real possibility that employees who receive these enhanced benefits will nevertheless breach their bargain and sue their employer.

The "Settlement Agreement and General Release" offered by Reichhold meets these qualifications. It was written in comprehensible terms and included a specific waiver of age discrimination claims. Reichhold advised Cassino to take the document home and to review it with an attorney. See Petition for Writ of Certiorari, p. 3.

The Ninth Circuit based its holding in part on its observation that settlement agreements offered at the time of termination ". . . may also tend to be coercive rather than conciliatory." 817 F.2d at 1343. However, since Cassino rejected the offer and refused to sign the release, it can hardly be said that he was coerced. The issue of coercion arises only after a claimant has executed a release and seeks to have it set aside on the grounds that it was involuntary. Moreover, neither the need to make a choice quickly nor the difficulty of electing between options necessarily renders a decision involuntary. *Henn v. National Geographic Society,* 819 F.2d 824 (7th Cir. 1987), *cert. denied,* November 30, 1987, No. 87-558.[3]

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forcement of non-EEOC supervised waivers under the ADEA. 52 Fed. Reg. 32,293 (1987) (to be codified at 29 C.F.R. § 1627.16). A pending amendment to H.R. 2763, 100th Cong., 1st Sess., which provides budget authorization for the EEOC and other agencies will, if adopted by Congress, suspend the final rule during fiscal 1988. 133 Cong. Reg. S14,383 (daily ed. October 15, 1987). *But see, e.g., Runyan* and *Lancaster,* which endorsed the EEOC's proposed rule.

[3] Observing that "releases are frequently offered at severance, EEOC Commissioner Silberman has said that ". . . a release should not be voided solely because the releasor was motivated by economic necessities." Silberman, *supra,* at 202.

The public policy encouraging settlement of disputes without litigation is furthered by the offer of severance pay in exchange for a general release of claims at the termination of an employment relationship. Several of the courts of appeals as well as the agency having responsibility for enforcement of Title VII and the ADEA have authorized the use of voluntary releases to resolve claims. The Ninth Circuit's decision to allow such a release to be admitted into evidence as proof of a willful violation of the ADEA frustrates this policy.

B. Evidence Rule 408, Which Precludes the Use of Settlement Offers to Prove Liability, Protects Attempts to Resolve Disputes Amicably.

The public policy favoring amicable resolution of disputes also is furthered by Rule 408 of the Federal Rules of Evidence, which precludes the use of settlement offers to prove liability.[4] *United States v. Contra Costa County Water District*, 678 F.2d 90 (9th Cir. 1982). The Advisory Committee's Note on Rule 408 explains that the rule is based on two grounds: (1) that the evidence is irrelevant because it may reflect an attempt to buy peace rather than an admission of liability, and (2) that ex-

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[4] The rule states:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Fed. R. Evid. 408.

clusion of such evidence promotes the public policy to encourage compromise and settlement. 10 J. Moore & H. Bendix, Moore's Federal Practice, § 408.01 (2d ed. 1987).

Rule 408 covers not only the offer itself, *Burns v. City of Des Peres*, 534 F.2d 103 (8th Cir. 1976), but also documents prepared in furtherance of compromise. *Ramada Development Company v. Rauch*, 644 F.2d 1097 (5th Cir. 1981). Settlement negotiations with third parties are likewise protected. *Branch v. Fidelity & Casualty Co. of New York*, 783 F.2d 1289 (5th Cir. 1986) (settlement with co-defendant inadmissible to show liability); *United States v. Contra Costa County Water District*, 678 F.2d 90 (9th Cir. 1982) (settlement negotiations between plaintiff and third party inadmissible).

The Ninth Circuit sought to avoid Rule 408 by distinguishing between a settlement offer made after an ADEA claim has been articulated and one made at termination before the terminated employee chooses to pursue a claim, saying ". . . the protections of Rule 408 were designed to encourage the compromise and settlement of *existing* disputes." 817 F.2d at 1343 (emphasis supplied).

Thus, the court below distinguished between two typical situations involving releases of ADEA claims by terminated employees in exchange for consideration. The first involves negotiated settlement of an ADEA claim asserted after termination. The second situation, and that which occurred in the instant case, entails a release offered at termination contemporaneously with a severance pay package. 817 F.2d at 1342. In the lower court's view, a settlement offer made after filing an ADEA claim is shielded by Rule 408 while one made at termination is admissible to prove not only liability but also a willful violation.

The Ninth Circuit inexplicably observed that in the second situation, "[s]uch termination agreements are generally made a part of the record in the case and are

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considered relevant to the circumstances surrounding the alleged discriminatory discharge itself. The termination agreements, therefore, are probative on the issue of discrimination." 817 F.2d at 1342. Apparently, the Ninth Circuit bases its departure from accepted procedure on the difference between a settlement agreement offered after an ADEA claim has been asserted, and one offered at the time of termination when no ADEA claim has yet been made.

The court's artificial distinction places an unreasonable burden on employers and employees alike. Under its approach, if an employer wishes to avoid having its offer of severance pay used as evidence of liability on a later claim because it asks for a release in return, it must wait until each of the employees involved in a reduction in force files a lawsuit before it can make the offer. Likewise, terminated employees cannot expect a gratuitous severance payment unless they first file a claim for every conceivable right and remedy arising out of their employment. Thus, the Ninth Circuit's decision actually encourages litigation by forcing employers to require all employees to file unnecessary or spurious claims so that their request for a release in return for severance pay can be characterized as an inadmissible settlement offer instead of an admissible termination agreement.

In addition to being unrealistic, as well as out of touch with the purposes of Rule 408, the authority cited by the Ninth Circuit in fact is directly opposite to the conclusion reached below. For example, the Ninth Circuit opinion at page 1342 cites four cases as authority for its unprecedented position. Those cases conflict with, rather than support the Ninth Circuit's novel approach.

All four cases cited arose under the ADEA and involve releases. In three of those cases the releases were introduced not by the plaintiff to prove discrimination but by the defendant to bar the claim successfully. Thus, in

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Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539 (8th Cir. 1987), *cert. denied*, 107 S.Ct. 3212 (1987), and *Moore v. McGraw Edison Company*, 804 F.2d 1026 (8th Cir. 1986), waivers signed in exchange for severance pay were offered into evidence by the employers and admitted as proof of valid releases which barred the ADEA actions. An alleged oral release was offered by the employer in support of a breach of contract claim in *Pruet Production Co. v. Ayles*, 784 F.2d 1275 (5th Cir. 1986), and the employee raised the ADEA in a counterclaim.

In the fourth case cited by the Ninth Circuit, *Sherrod v. Sears, Roebuck & Co.*, 785 F.2d 1312 (5th Cir. 1986), an employee terminated as part of a reduction in force refused to sign a release in exchange for accrued vacation and severance pay. As in the instant case, the release was a general waiver of claims requested from all employees receiving severance pay. Holding that Sherrod had produced insufficient evidence of age discrimination, the Fifth Circuit observed that Sherrod failed to show a connection between the release and Sears' alleged discriminatory intent. 785 F.2d at 1315.

Also, the court inappropriately relies on EEOC Commissioner R. Gaull Silberman's observation that releases of ADEA claims usually arise after assertion of an ADEA claim or at termination in conjunction with an offer of severance pay. R. Silberman and C. Bolick, *The EEOC's Proposed Rule on Releases of Claims under the ADEA*, 37 Lab.L.J. 195, 195-196 (1986). In explaining the EEOC's position that voluntary waivers of ADEA claims need not be supervised by the EEOC, Commissioner Silberman specifically refused to limit her endorsement to settlements of asserted claims, stating,

> "Limiting releases in this manner would eliminate the use of releases in reduction in force situations, where employers offer consideration in exchange for releases of claims, thereby inhibiting amicable agreements and limiting the options available to older em-

> ployees. Such an arbitrary approach does not serve the objectives of the Act . . . .

Id. at 202. There is no reason to distinguish the two situations. In each, an employee gives up a potential right in return for consideration.

Accordingly, the writ should be granted to review the decision below which is contrary to Rule 408 and other court decisions.

II. THE NINTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S HOLDING IN *TRANS WORLD AIRLINES V. THURSTON* THAT A "WILLFUL" VIOLATION REQUIRES KNOWLEDGE OR RECKLESS DISREGARD OF THE AREA.

This Court has determined that in order to find a "willful" violation of the ADEA and thus award double damages, the employee must show that the employer either knew its conduct violated the ADEA or showed a reckless disregard for the Act's prohibitions. *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985). The Ninth Circuit considered the "General Release and Settlement Agreement" to be part of the "substantial evidence" supporting the jury's finding of a "willful" violation. The Ninth Circuit's analysis conflicts directly with this Court's reasoning in *Trans World Airlines*.

Section 7(b) of the ADEA, regarding enforcement, incorporates by reference certain provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, including § 16(b) which mandates an award of an additional sum equal to the back pay award as "liquidated damages." 29 U.S.C. § 216(b). The ADEA specifically restricts liability for liquidated damages to "cases of willful violations" of the ADEA. 29 U.S.C. § 626(b).

This Court addressed the appropriate construction of "willful violation" in *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985), for purposes of awarding liquidated damages under the ADEA and held that "a viola-

tion is 'willful' if '. . . the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" 469 U.S. 111, 128 (1985) (quoting *Air Line Pilots Association, International v. Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2d Cir. 1983)). In so doing, this Court specifically rejected the standard which would find a willful violation if the employer knew the statute was "in the picture." This Court has now granted certiorari in *Brock v. Richland Shoe Company*, 799 F.2d 80 (3rd Cir. 1986) (*cert. granted*, No. 86-1520, October 5, 1987) to determine whether the "in the picture" standard should be used in determining the appropriate statute of limitations under the ADEA.

The court below listed the "Settlement Agreement and General Release" as part of the "substantial evidence" supporting the jury's finding of willful age discrimination simply because "the termination agreement . . . specifically required Cassino to waive his right to sue for age discrimination in return for severance pay." 817 F.2d at 1348. This conclusion is tantamount to use of the "in the picture" standard rejected by this Court in *Trans World Airlines*, because to be enforceable against age suits, any valid release either will expressly refer to age discrimination or will be relied upon later as implicitly including ADEA claims.

This Court realized that the "in the picture" standard "would result in an award of double damages in almost every case," because "[a]s employers are required to post ADEA notices, it would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability." *Trans World Airlines*, 469 U.S. 111, 128, (1985). Similarly, employers seeking to obtain releases of all potential claims in exchange for consideration as part of a reduction in force commonly include language waiving age-based discrimination claims. *See* R. Silberman and C. Bolick, *The EEOC's Proposed*

Rule on Releases of Claims under the ADEA, 37 Lab. L.J. 195, 195-196 (1986). Under the Ninth Circuit's decision, any release which specifically called for a waiver of claims based on age would be evidence of a "willful" violation of the ADEA. This result makes no legal or logical sense. The fact that an employer tenders a release does not necessarily mean that the employer has committed age discrimination; it merely shows that the employer was protecting itself from the possibility of a suit on those grounds.

The "Settlement Agreement and General Release" which Reichhold presented to Cassino with an offer of consideration does not prove that Reichhold terminated Cassino in violation of the ADEA. On the contrary, it is in keeping with a widely used practice of companies implementing reductions in force. Indeed, the inclusion of a specific waiver of ADEA claims conforms to the EEOC's requirement that waivers be "knowing and voluntary." [5] At best, it shows that Reichhold knew that the ADEA was "in the picture," but not that Reichhold willfully violated the ADEA.

Accordingly, it is clear that review on the writ of certiorari herein is appropriate because of the Ninth Circuit's unsubstantiated and unprecedented sanction of the admission of a settlement offer into evidence as probative of age discrimination and a willful violation of the ADEA in conflict with this court's decision in *Trans World Airlines*.

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[5] One of the factors listed by the EEOC as indicating a "knowing and voluntary" waiver of ADEA claims is that "The agreement . . . clearly waived the employee's rights or claims under the ADEA." 29 C.F.R. § 1627.16(c)(1). Thus, in order to obtain a valid unsupervised waiver of ADEA claims, the employer must include in the release language which clearly waives age discrimination claims. This language in Reichhold's release, however, was found to be evidence of a "willful" violation."

III. THE NINTH CIRCUIT'S DECISION COULD JEOPARDIZE BONA FIDE SEVERANCE PROGRAMS, TO THE DETRIMENT OF EMPLOYEES, EMPLOYERS, AND THE GENERAL PUBLIC POLICY FAVORING SETTLEMENTS.

The Ninth Circuit's decision could have a chilling effect on bona fide severance programs. But there are even broader implications. While the lower court's opinion arose under the ADEA, its holding clearly could be extended to other cases involving employment relationships, such as Title VII, the Equal Pay Act or wrongful discharge claims. Thus, a release offered at termination could be used later to substantiate nearly any claim against the employer.

A genuine severance pay program such as that offered to Cassino by Reichhold provides a gratuitous payment at termination of employment in exchange for a release of claims against the employer. As explained, "This scenario most frequently accompanies reductions in force." Silberman, *supra*, at 196. The usual purpose of severance pay is to ". . . tide an employee over while seeking a new job. . ." *Adcock v. Firestone Tire and Rubber Company*, 822 F.2d 623, 636 (6th Cir. 1987) (unemployment held to be prerequisite for termination pay under terms of plan in question). Unless an employer has willingly obligated itself to a formal severance pay plan, an employee is not entitled to any more at termination than accrued wages and benefits due.

Augmented severance pay plans in large part are related to the employer's discretion. It is entirely reasonable to expect employees who are receiving exceptional payments upon separation, in return, to release any claims against the employer. As here, those dissatisfied with the amount of the settlement offer are free to reject it and seek a larger amount through litigation. The many others, however, who have no disagreement with the employer and are satisfied with the amount of sev-

erance pay may enjoy the increased payment without the uncertainties of a contested lawsuit.

A request for a release and "settlement agreement" is not in and of itself an admission of liability. On the contrary, releases arise from a variety of circumstances. Obviously, a party may attempt to negotiate a compromise when he knows he has violated the law and now seeks to minimize the damage. But a settlement can also spring from the choice of those having opposing viewpoints to agree to disagree and end the controversy. The existence of a release, whether executed or not, also can indicate uncertainty; when neither party is sure of a victory at trial, they may compromise on middle ground. Finally, in some cases, parties having no disagreement reduce an agreement to writing and include a release as protection against breach.

In any of these situations, the usual purpose of a settlement is to avoid the risk of litigation. *See, e.g., United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971). It does not establish that either party was in the right. As noted by the Fifth Circuit in *Florida Trailer and Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960), regarding judicial approval of settlements:

> Of course, the approval of a proposed settlement does not depend on establishing as a matter of legal certainty that the subject claims or counterclaim is or is not worthless or valuable. The probable outcome in the event of litigation, the relative advantages and disadvantages are, of course, relevant factors for evaluation. But the very uncertainty of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of the law generally to encourage settlements. This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty. Parties would be hesitant to explore the likelihood of settlement apprehensive as they would be that the application for

> approval would necessarily result in a judicial determination that there was no escape from liability or no hope of recovery and hence no basis for a compromise.

284 F.2d at 571. Thus, it is the fact of uncertainty and not the firm assurance that one party has violated the law that often leads to settlements; if both parties are unsure of the probable outcome, they may be able to reach a compromise satisfactory to both. Since doubt as to liability may be the very source of a proposed release and settlement agreement, it is clearly erroneous to use such an agreement as an admission of liability. Indeed, even an employer that is absolutely confident that it has no legal liability to a discharged employee may conclude that it is worthwhile to offer valuable consideration in return for a release of potential claims in order to avoid the probable adverse publicity and inevitable costs of defending against even a meritless claim. For these numerous reasons, it is most improper to use such a tendered release as evidence of *any* violation of the ADEA, much less a willful one.

Employers are well aware that if no release is obtained, the occasional disgruntled employee is likely to sue the employer while at the same time enjoying the enhanced severance benefit. Employers thus probably will not gratuitously offer severance pay without asking for a release in exchange. If an offer with a release is admissible to show liability, it is more likely that no offer will be made at all.

If the Ninth Circuit's decision is allowed to stand, the potential for harm to innocent third parties is great. Employers will strongly consider no longer offering exceptional severance pay based on salary and service to all employees affected by a reduction in force. Both employers and employees will have to engage in a charade of litigation to create a fictitious "existing" claim before the employer may make a valid settlement offer that will not be admissible to prove a substantive violation.

The need for this Court's review is apparent since the Ninth Circuit's holding conflicts with the long standing policy encouraging settlement without litigation and could have a devastating effect on severance pay programs.

CONCLUSION

For the foregoing reasons, the amicus respectfully urges this Court to grant the petition herein and issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

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December 8, 1987